Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 71-1180

JOHN THOMAS FLOWER,
Petitioner,

v.

UNITED STATES,
Respondent.

BRIEF OF THE AMERICAN FRIENDS SERVICE COMMITTEE AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI FROM THE FIFTH CIRCUIT COURT OF APPEALS.

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INTEREST OF *AMICUS.*

The interest of the American Friends Service Committee, Incorporated (AFSC), in this case is substantial. It arises immediately from the fact that Petitioner occupies a position of importance and responsibility on the staff of AFSC. His arrest, detention initially without bail, conviction, and sentence of six months' imprisonment had a detrimental effect on the programs of AFSC in the Texas, Oklahoma, and Arkansas region where Petitioner had served as AFSC's Peace Education Secretary since June, 1969.

Beyond this immediate interest as Petitioner's employer, AFSC has a broader interest in this case, in that an adverse result would have a grave effect on the entire AFSC program.

The American Friends Service Committee is a corporate expression of Quaker faith and practice. Founded during World War I to provide a vehicle for alternative service for young men who could not, in conscience, bear arms, AFSC has been from that time to the present an expression of religious opposition to warmaking. AFSC was incorporated with the broad purpose of engaging in religious, charitable, social, philanthropic, and relief work in the United States and foreign countries on behalf of the Religious Society of Friends (Quakers). A high percentage of staff are Friends; participation has always been open to persons, like Petitioner, who are sympathetic with the principles of Friends although not themselves members of the Religious Society of Friends.

In light of this philosophy, tradition, and program, AFSC's broader interest in this case is clear. The mission of peace education may often and in this case did involve reaching people on military posts. The consequence of an adverse decision in this case would reach far beyond the individual Petitioner and extend to many of the peace education programs of AFSC, virtually all of which involve the exercise of the First Amendment rights here involved. Hence, AFSC desires to be heard and respectfully moves the Court to accept jurisdiction on the writ of certiorari.

REASONS FOR GRANTING CERTIORARI.

The American Friends Service Committee, Incorporated, as *amicus curiae,* files this brief to urge the Court to grant the petition for certiorari so that it may closely examine the unwarranted expansion of its decision in *Cafeteria Workers v. McElroy,* 367 U. S. 886, 81 S. Ct. 1743 (1961) by the Fifth Circuit in affirming Petitioner's conviction.

The Fifth Circuit affirmed Petitioner's conviction for violation of 18 U. S. C. § 1382 which prohibits entry upon a military post for any purpose prohibited by orders of the Post Commander pursuant to regulations. Petitioner was arrested while on the premises of Fort Sam Houston for distributing leaflets advertising a "Town Meeting on the Vietnam War" in violation of a properly prepared and executed order of debarment. The debarment order was issued on information that the Petitioner had participated in an attempt to distribute an unauthorized publication contrary to Fort Sam Houston Regulation 210-6.

The Fifth Circuit relied on *Cafeteria Workers* to hold that Regulation 210-6 which enables a military commander to maintain post discipline and morale by requiring prior approval of all publications to be disseminated on the post does not constitute an unlawful prior restraint on speech. *Cafeteria Workers,* however, is readily distinguishable from the instant case for three reasons:

First, the Gun Factory in *Cafeteria Workers* was a highly sensitive military installation; Fort Sam Houston is an "open post." There are thirty-one entrances through which civilians may enter and leave without challenge. In fact, civilians using some public highways in San Antonio necessarily drive through Fort Sam Houston.

Second, the asserted basis for exclusion in *Cafeteria Workers* was security; the basis for exclusion of petitioner

was morale and discipline. Because the government's interest in security is admittedly greater than its interest in morale and discipline, the Court should be less inclined to permit a commander to hide behind a declaration *ex cathedra* that a civilian is a threat to discipline than a threat to security. That is, a determination that a person is a threat to discipline, without further explanation, should raise a presumption, contra *Cafeteria Workers*, of arbitrariness. The Seventh Circuit's decision in *Kiiskila v. Nichols*, 433 F. 2d 745 (7th Cir. 1970) demonstrates this distinction.

Third, the interest at stake in *Cafeteria Workers* was a right to employment; the interest at stake in the instant case is the First Amendment right of freedom of speech and freedom of association. In *Cafeteria Workers* the court did not purport to base its decision on a balancing of the employee's rights and the government's interest in maintaining security. However, here First Amendment rights require the court to balance petitioner's freedoms of speech and association with the government's alleged interest in maintaining morale and discipline. No evidence was presented of any detrimental effect of the distribution of literature, much less of petitioner's contribution to any detrimental effect. Since the issue at stake here is, for most people, of grave significance, and since it has so divided the citizens of this country, it is imperative that free and peaceful exchange of ideas be encouraged. Here Petitioner did nothing more than advertise a public meeting on discussion of the War. Certainly all segments of the population should be encouraged to formulate public opinion. The military must not be excluded.

CONCLUSION.

For the foregoing reasons, amicus respectfully urges that the petition for certiorari be granted.

Respectfully submitted,

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